Filed 8/01/13 In re N.F. CA1/4

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

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| In re N.F., a Person Coming Under the Juvenile Court Law. | |
| SAN FRANCISCO HUMAN SERVICES AGENCY,<br>Plaintiff and Respondent,<br>v.<br>I.F.,<br>Defendant and Appellant. | A136637<br>(San Francisco County Super. Ct. No. JD12-3146) |

Appellant I.F. (father) challenges the juvenile court's order accepting jurisdiction over his toddler daughter N.F.[1] and denying him reunification services. He contends that order must be reversed because it was improperly based on the fact that he was incarcerated. We disagree and affirm.

## I.
## FACTUAL AND PROCEDURAL BACKGROUND

Eighteen-month-old N.F. came to the attention of respondent San Francisco Human Services Agency (Agency) in May 2012 when it received a referral claiming that

[1] In accepting jurisdiction, the court found N.F. to be a child described by Welfare and Institutions Code section 300, subdivision (b). All further statutory references are to the Welfare and Institutions Code.

N.F.'s mother, J.R. (who is not a party to this appeal), was a known drug dealer and that N.F. was being neglected.[2] An investigation ensued, and it revealed scant evidence that father had any meaningful role in N.F.'s life. Mother identified appellant as N.F.'s father, and D.T. reported that father was incarcerated "somewhere in Kentucky." The investigation found that N.F.'s primary caretaker was father's cousin, D.T., who N.F. called " 'mom' " and who lived with mother to help care for N.F. Two other paternal cousins apparently also helped care for N.F., and mother agreed to a safety plan that called for N.F. to stay with them and D.T. Relatives believed mother was dealing drugs and had mental-health issues. The investigation disclosed that Mother had six older children, none of whom were living with her at the time, and three of whom previously had been dependents of the juvenile court.

As a result of the investigation, the Agency filed a juvenile dependency petition in late May under section 300. The petition contained several allegations against mother under subdivision (b) (failure to protect), including that she was unable to protect N.F. because of substance-abuse and mental-health problems and that she had failed to provide for N.F.'s medical needs. The petition also contained allegations against father: one under subdivision (b) that father's ability to care for N.F. was impaired because of his criminal history and because he was incarcerated, and another under subdivision (g) that father lacked the ability to provide support for N.F. because his whereabouts and ability to care for N.F. were unknown. The juvenile court ordered N.F. detained and placed her

[2] The referral followed a home-invasion robbery at mother's residence that occurred when mother was away, but when others, including N.F. and her caretaker, were present and ordered at gunpoint to the floor. One of the allegations against mother in the dependency petition related to the robbery, and news and police reports about it were discussed in or attached to the Agency's detention report. At the beginning of the combined jurisdictional/dispositional hearing, the juvenile court granted mother's hearsay objections to the news and police reports and later found that the Agency had not met its burden of proving the allegation related to the robbery. We mention the robbery to provide context as to why the Agency initiated dependency proceedings, but we do not rely on the excluded evidence in evaluating the juvenile court's jurisdictional finding.

with the paternal relatives who had been caring for her. The court later ordered that appellant was the presumed father.

Father demurred to the petition, arguing that the pleading contained no facts demonstrating that N.F. suffered or was at a substantial risk of suffering harm by him or that he was unable to provide for her care. Father also submitted a declaration stating: "Although I am currently incarcerated, I can arrange for members of my family to provide for the care of my child, N[.F]. In this regard, I have two sisters, D[.T. and B.B.][3] who can provide a home and care for N[.F.]"

Father was located at a federal prison in Kentucky, where he apparently had been incarcerated since a few months after N.F.'s birth. D.T. reported that he was not scheduled to be released until December 16, 2017. Although the Agency wrote to father to ask about the status of his incarceration, it did not hear back from him as of the time it filed a disposition report in June 2012. A criminal-background check revealed that father had six felony convictions from 1999, 2001, 2004, 2007, and 2011 in addition to one misdemeanor conviction and 24 arrests. The offenses included assault with force likely to cause serious injury, numerous firearm-possession violations, and a domestic-violence conviction.

Paternal relatives reported that father had been "in and out of prison for most of his adult life." Mother reported that father had not been present at N.F.'s birth because he was incarcerated at the time, and had only been part of their daughter's life for three months, but she stated that she had a "good" relationship with father, and he supported her "through letters and phone calls." The Agency reported that father had "not been involved in the minor's life." It did not arrange for visitation, and it recommended in its

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**3** In the initial detention report filed with the juvenile court, the social worker described these two women as paternal aunts. Although father's declaration filed about a month later described D.T. as his sister (consistent with the detention report), D.T. reported to the Agency that she was father's cousin and that father was the youngest of six boys (presumably meaning he has no sisters), and the social worker later testified that the women caring for N.F. were father's cousins, not sisters.

June 2012 disposition report that reunification services for father be bypassed because he was incarcerated out of state.

Father contacted the social worker on July 11, 2012, and stated that he was "supportive" of his daughter's placement with her current caregivers, who were willing and able to provide the structure and consistency N.F. needed. He also said that he was participating in parenting-education and anger-management classes while in prison and could be released as early as 2015. The Agency nonetheless continued to recommend that reunification services be bypassed because father "has not been in the minor's life and will be incarcerated until the earliest 2015, [and] thus would not benefit from family reunification services."

The combined jurisdictional/dispositional hearing was held on August 31, 2012. Father's counsel tried unsuccessfully to reach father by telephone so father could participate in the hearing from prison. The hearing proceeded in his absence. The Agency's social worker testified about her July telephone call with father in which father expressed his support for N.F. to remain with his relatives. The social worker acknowledged on cross-examination that the Agency had not filed a dependency petition when father was first incarcerated a few months after N.F.'s birth. When asked, "[I]s it fair to say that dad was a nonoffending parent, meaning he was in prison and he wasn't doing anything to harm the child?," the social worker responded, "Yes."

At the conclusion of the hearing, the juvenile court entered its order. As to mother, the court sustained the failure-to-protect allegations under section 300, subdivision (b) because mother had failed to provide for N.F.'s medical needs by not ensuring that N.F. was properly immunized, had an impaired ability to care for N.F. because of her mental-health problem, and had a long child-welfare history based on allegations of neglect.

As to father, the court agreed with his counsel that the count for not providing for support under section 300, subdivision (g) should be stricken because it simply alleged

that father's whereabouts were unknown, which was untrue at the time of the hearing.[4] But the court sustained the count for failure to protect under section 300, subdivision (b), after amending it to read that "father's ability to care for the child is impaired in that he has a criminal history, is currently incarcerated, and will not be released before 2015."

The court adjudged N.F. a dependent child and continued her placement with relatives. It ordered reunification services for mother but denied them for father, finding by clear and convincing evidence that they would be detrimental to N.F. since she was under the age of three and father was not scheduled to be released from prison any sooner than 2015. Father timely appealed.

## II.
## DISCUSSION

### *A. Jurisdiction as to Father.*

Father argues that insufficient evidence supports the juvenile court's finding that N.F. is a child described by section 300, subdivision (b).[5] Subdivision (b) provides a basis for jurisdiction if the child has suffered, or there is a substantial risk the child will suffer, serious physical harm or illness caused by the parent's failure or inability to

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[4] Counsel also argued that father's demurrer should be sustained because the Agency could not show, as required by *In re Aaron S.* (1991) 228 Cal.App.3d 202, that father was unable to arrange for the care of his child at the time of the hearing. Although the court questioned whether *Aaron S.* applied in these circumstances, it nonetheless struck the count under section 300, subdivision (g) on the alternative basis that, contrary to the allegation, father's whereabouts *were* known at the time of the hearing.

[5] In his notice of appeal, father represented that he was challenging the juvenile court's jurisdictional finding, "including denial of [his] Demurrer." Father's demurrer was addressed at the same time that jurisdiction was considered, and his arguments on both issues were almost indistinguishable, which may be why father referred to the demurrer in his notice of appeal. Respondent argues that father waived any challenge of the denial of his demurrer by failing to address the issue in his opening brief. (E.g., *Paulus v. Bob Lynch Ford, Inc*. (2006) 139 Cal.App.4th 659, 685 ["Courts will ordinarily treat the appellant's failure to raise an issue in his or her opening brief as a waiver of that challenge"].) It is technically true that father does not specifically challenge the ruling on his demurrer in his appellate briefs, and for that reason we do not address it. But it would be an overstretch to contend that father waived his jurisdictional arguments, given the overlap in the issues presented to the juvenile court.

adequately supervise or protect the child, or the failure to adequately supervise or protect the child from the conduct of the child's custodian with whom the child has been left, or the willful or negligent failure to provide the child with food, clothing, shelter, or medical treatment. "A jurisdictional finding under section 300, subdivision (b) requires '(1) neglectful conduct by the parent in one of the specified forms; (2) causation; and (3) "serious physical harm or illness" to the minor, or a "substantial risk" of such harm or illness.' [Citation.] 'Subdivision (b) means what it says. Before courts and agencies can exert jurisdiction under section 300, subdivision (b), there must be evidence indicating that the child is exposed to a *substantial risk of serious physical* harm or illness.' [Citation.]" (*In re Noe F.* (2013) 213 Cal.App.4th 358, 366, original italics.)

"On appeal, in reviewing a challenge to the sufficiency of the dependency court's jurisdictional findings, our power begins and ends with a determination as to whether substantial evidence exists, contradicted or uncontradicted, supporting the dependency court's determinations. We review the evidence in the light most favorable to the dependency court's findings and draw all reasonable inferences in support of those findings. [Citations.] Thus, we do not consider whether there is evidence from which the dependency court could have drawn a different conclusion but whether there is substantial evidence to support the conclusion that the court did draw. [Citations.]" (*In re Noe F., supra,* 213 Cal.App.4th at p. 366.) Substantial evidence supports the juvenile court's jurisdictional finding.

Father claims that the "mere fact of [his] incarceration" could not provide the basis for finding jurisdiction under section 300, subdivision (b). We find this argument unpersuasive because father's incarceration was *not* the sole reason supporting the juvenile court's order; it was also based on father's demonstrated inability to adequately protect N.F. from mother's impaired ability to care for their daughter. An argument similar to father's was made and rejected in *In re James C.* (2002) 104 Cal.App.4th 470. In that case, a social services agency removed children from their mother's care because of "deplorable home conditions." (*Id.* at p. 483.) The appellate court concluded that because the father was incarcerated, he was unable to adequately protect the children

from those conditions or to supervise them, thus supporting a finding under section 300, subdivision (b). (*James C.* at p. 483.) The same is true of father in this case. Like the facts in *James C.*, there was scant evidence presented here that father ever made inquiries about his child's care or supervision before dependency proceedings were initiated, and it was the social service agency that made the arrangements for the child's current placement. (*Ibid.*)

Father claims, without citation to the record, that he "was able to arrange for the care of the minor, as evidenced by [her] placement with [his] extended family, who had always been the minor's protector and provider in any event." He further contends that it is "reasonable to assume" that he knew of the role his relatives were playing in N.F.'s life, and he suggests that he "would have been able to testify about these facts" had his attorney been able to reach him by telephone at the hearing. In other words, father asks this court to infer that he played a meaningful role in arranging for N.F.'s care simply because N.F. was being cared for by his relatives. We decline to do so. No evidence was presented that father actually played any such role, only that he approved of the arrangement when he discussed it with the social worker after dependency proceedings had been initiated. His declaration said nothing about any involvement he had in ensuring that his relatives cared for N.F. and instead just stated that he was *currently* able to arrange care for the minor with his "two sisters," who are actually his cousins.

Moreover, although father's trial counsel attempted to reach father by telephone so that he could participate telephonically in the August 31 hearing, counsel stated at that time that he did not intend to call father as a witness. Thus, and contrary to father's argument on appeal, there is no reason to believe that father would have testified or offered additional evidence at the hearing even if he had been able to participate in it.

We also do not find it particularly consequential that the Agency, as father puts it, "conceded" that father was "the non-offending parent." Father's argument is apparently an oblique reference to section 361, subdivision (c)(1), which provides that the juvenile court shall allow a "nonoffending parent" to retain physical custody of a dependent minor so long as the parent presents an acceptable plan that the parent will be able to protect the

child from future harm. But simply because the social worker agreed that father was "in prison and he wasn't doing anything to harm the child" when the dependency petition was filed does not mean that the Agency considered father to be a "non-offending parent" for all purposes. This is especially apparent since the Agency unambiguously alleged that father's ability to care for the minor was impaired. Father also emphasizes that he was not listed as an offending parent in any prior referrals regarding N.F. But this point similarly does little to advance father's cause because father had no meaningful role in most of N.F.'s life.

The cases upon which father relies are easily distinguishable, both factually and legally. In *In re Noe F.*, *supra*, 213 Cal.App.4th 358, the minor was taken into protective care after her mother was arrested, and the juvenile court found that the minor was a child described by section 300, subdivision (b). (*Noe F.* at pp. 361-363.) The appellate court reversed. It agreed with the mother that "incarceration, without more, cannot provide a basis for jurisdiction." (*Id.* at p. 366.) It concluded that there was no basis to assert jurisdiction because the mother had identified two suitable placements for her daughter, one of whom agreed to care for the child. (*Id.* at pp. 362, 364, 366.) Here, by contrast and as discussed above, there is no evidence in the record that father arranged for N.F.'s care when he was incarcerated. To the contrary, it is clear that N.F. continued to live with mother, who was incapable of caring for her daughter without the assistance of paternal relatives. Simply stated, the juvenile court did not rule against father solely because he was incarcerated; it ruled against him because evidence demonstrated his "inability to supervise the child adequately," which is a sufficient basis to find jurisdiction under section 300, subdivision (b). (E.g., *In re Alexis H.* (2005) 132 Cal.App.4th 11, 16 ["While in prison, [father] cannot care for or supervise his children, rendering his imprisonment enough for the court to exercise jurisdiction under section 300, subdivision (b)"].)

*In re Aaron S.*, *supra*, 228 Cal.App.3d 202 is also inapposite because it dealt solely with section 300, subdivision (g), which provides that jurisdiction is appropriate where, among other circumstances, a parent has been incarcerated and cannot arrange for

his or her child's care. (*Aaron S.* at pp. 204, 207-212.) *Aaron S.* held that the proper focus of subdivision (g) is whether a parent is unable to arrange for a child's care at the time of the jurisdictional hearing, not whether he or she failed to do so at some previous point in time. (*Aaron S.* at p. 210.) Here, the count against father under subdivision (g) alleged that his whereabouts were unknown, and it was stricken. Father acknowledges that the juvenile court struck this count, but he contends that the court failed to address "the more substantive issue" of his present ability to care for his daughter. Whatever relevance such evidence has in making a jurisdictional finding under subdivision (g), we agree with the juvenile court and respondent that the focus is different when making a finding under subdivision (b). "While an incarcerated parent can avoid jurisdiction under section 300, subdivision (g) by arranging for his or her child's care [citations], the same is not true of a parent whose acts or omissions have led to jurisdictional findings under section 300, subdivision (b)." (*In re A.A.* (2012) 203 Cal.App.4th 597, 607.) Sufficient evidence supports a jurisdictional finding as to the subdivision (b) count against father in light of his inability to protect N.F. from the conditions that led to the initiation of dependency proceedings. (*In re James C., supra,* 104 Cal.App.4th at p. 483.)

*B. Denial of Reunification Services.*

Father claims that the order denying him reunification services must be set aside, again on the basis that the juvenile court placed improper emphasis on his incarceration. "We examine the court's determination denying reunification services for substantial evidence. [Citations.]" (*In re James C., supra,* 104 Cal.App.4th at p. 484.)

The juvenile court denied services to father under section 361.5, subdivision (e)(1), which provides that the juvenile court shall order reunification services for an incarcerated parent "unless the court determines, by clear and convincing evidence, those services would be detrimental to the child." In determining such detriment, the court shall consider such factors as the child's age, the degree of parent-child bonding, the length of the parent's sentence, and the degree of harm to the child if services are not offered. (§ 361.5, subd. (e)(1); *In re James C., supra,* 104 Cal.App.4th at p. 485.)

The evidence here, as in *James C., supra,* 104 Cal.App.4th at page 485, "supports the denial of reunification services based on application of the factors for determining detriment to a child pursuant to section 361.5, subdivision (e)(1)." Like in *James C.*, father's release date exceeded the 12-month period of reunification services that could be provided (§ 361.5, subd. (a)), father has a long history of incarceration, there is no evidence that father has a significant relationship with the child, and there is no evidence that the child would be harmed from not receiving reunification services. (*James C.* at pp. 485-486.)

Father does not provide any compelling legal or factual arguments to the contrary. His counsel all but conceded below that, once the juvenile court sustained the jurisdictional allegation against father, father's lengthy prison sentence precluded the provision of reunification services, stating "there's always hope, though I don't have a factual basis upon which to hang that hope on." On appeal, father claims that neither the Agency nor the juvenile court "engaged in [a] meaningful examination of the factors" set forth in section 361.5, subdivision (e), but he does not explain how a more "meaningful" analysis of the relevant factors—which were addressed in the Agency reports considered by the court—would have led to a different result.

Father's legal argument points to the statutory requirements for reunification services for incarcerated parents where such services *are in fact ordered*. (§ 361.5, subd. (e)(1)(A)-(D); *Mark N. v. Superior Court* (1998) 60 Cal.App.4th 996, 1010-1011 [where reunification services ordered for incarcerated parent, such services must be reasonable].) This authority, however, is inapplicable in a case such as this one in which the juvenile court found that services would be detrimental to the minor, and thus should not be offered in the first place.

Father hints that the juvenile court somehow miscalculated the maximum length of time that reunification services could be provided in this case to suggest that it could have extended beyond father's earliest possible release date of 2015—two years after the dispositional hearing. Section 361.5, subdivision (a)(1)(B) provides that court-ordered reunifications services shall be provided in cases involving a minor under the age of three

for no longer than 12 months "from the date the child entered foster care as provided in Section 361.49 . . . ." Section 361.49, in turn, provides that a child shall be deemed to have entered foster care on the earlier of the date the jurisdictional hearing was held or the date that is 60 days after the date on which the child was initially removed from the physical custody of his or her parent. Father claims that N.F. was not "placed in foster care, as such," because she remained with relatives, and thus "the concerns underlying the time limitations of [the statute] were not prevalent in this case." Father, however, offers no authority for his proposition that the reunification period would be longer for N.F. because she was placed with relatives.

Father cites *In re Kevin N.* (2007) 148 Cal.App.4th 1339, 1344, which held that reunification services for an incarcerated parent should only be denied if they would be detrimental to the minor—not just futile because of the length of incarceration. But the juvenile court here specifically found that reunification services would be detrimental to N.F. Both N.F.'s counsel and county counsel stressed that N.F. needed a permanent plan in place before 2015. Establishing a permanent plan promptly is consistent with the Legislature's goal of obtaining permanency and stability as soon as possible for dependent minors, and the failure to do so can be harmful to the child. As explained in a leading juvenile dependency treatise, "While providing services to an incarcerated parent is required in most circumstances, there are many cases in which the provision of such services has little or no likelihood of success *and thus only serves to delay stability for the child* . . . . This is especially true when *the parent will be incarcerated longer than the maximum time periods for reunification efforts* . . . . Indeed, to attempt services in such circumstances may be setting everyone up for failure, including the parent, agency, and child. Thus, in cases such as these, it may be possible to show that providing services to the incarcerated parent would be detrimental to the child *since it would delay permanency with no likelihood of success*." (Seiser & Kumli, Cal. Juvenile Courts Practice and Procedure (2012 ed.) Disposition Hearing, § 2.129[2][b], pp. 2-390-2-391, italics added.)

Finally, we note that the resolution of this case does not necessarily mean that father's parental rights will be terminated. As county counsel represented below in response to father's concern that appellant could lose parental rights, "Really this case comes down to mom. If mom reunifies and dad gets out, he is still going to—he'll be fine. Because if he has no requirements, there is no reason he can't come into [N.F.]'s life." In the meantime, the juvenile court did not err when it denied father reunification services since substantial evidence supported the finding that they would be detrimental to N.F.

## III.
## DISPOSITION

The juvenile court's dispositional order is affirmed.

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Humes, J.

We concur:

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Ruvolo, P. J.

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Rivera, J.